(3)

No. 08-1595

In the Supreme Court of the United States

STEVEN MANNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) provides that the judgment in an action under the jurisdictional provision of the FTCA, 28 U.S.C. 1346(b), "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The question presented is whether, under Section 2676, a judgment on FTCA claims bars a judgment on *Bivens* claims when the FTCA claims and the *Bivens* claims were brought together in the same lawsuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 546 F.3d 430. The opinion of the district court (Pet. App. 19a-37a) is unreported but is available at 2006 WL 3825043.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2008. A petition for rehearing was denied on January 26, 2009 (Pet. App. 38a-39a). On April 20, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 25, 2009, and the petition was filed on June 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides a limited waiver of sovereign immunity for claims against the federal government based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1); *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24. At the same time, the FTCA does "not assure injured persons damages for all injuries caused by such employees," *id.* at 17, as it places a variety of limits on the United States' waiver of its immunity as well as on the scope of the United States' substantive liability under the Act. *Id.* at 17-18.

Among the FTCA's limits is the judgment bar contained in 28 U.S.C. 2676, which provides that an FTCA judgment cuts off the plaintiff's ability to pursue other avenues of relief against government employees based on the same conduct or transaction as the FTCA claim: "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Thus, although the FTCA provides plaintiffs with the opportunity to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability, the judgment bar ensures that the government is protected from having to expend its re-

sources defending multiple actions or multiple theories of recovery arising out of the same incident.

2. Following extensive investigations by the Federal Bureau of Investigation (FBI), local police, and other authorities, petitioner was convicted of kidnapping in Missouri and murder in Illinois. Pet. App. 21a. These convictions were ultimately overturned: the Illinois Supreme Court reversed petitioner's murder conviction, and the Eighth Circuit granted habeas relief on his kidnapping conviction. *Id.* at 2a. Authorities elected not to retry petitioner on either charge. *Ibid.*

Petitioner subsequently filed a constitutional tort claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against two FBI agents, Robert Buchan and Gary Miller, seeking damages for his allegedly wrongful prosecution and imprisonment. Pet. App. 3a. In the same lawsuit, petitioner brought an FTCA claim against the United States, for the common-law torts of malicious prosecution and intentional infliction of emotional distress. *Ibid.*

In a pretrial order, the district court noted that Section 2676 could bar petitioner's *Bivens* claims if petitioner received a judgment on the FTCA claims. See Docket entry No. 157 (11/9/04 order setting petitioner's claims for trial). Beginning in December 2004, petitioner's claims were tried in a single, combined trial, with the *Bivens* claims tried to a jury and the FTCA claims tried to the district court. Pet. App. 3a, 19a. The jury found in favor of petitioner on his *Bivens* claim and awarded him $6.5 million in damages. *Id.* at 3a. While the district court had the FTCA claims under advisement, petitioner moved the court to enter judgment on the jury's verdict relating to the *Bivens* claims. *Id.* at

4a. In his motion, petitioner acknowledged the risk that under Section 2676, a subsequent judgment on his FTCA claim might nullify the *Bivens* judgment. *Id.* at 4a, 22a-23a.

In September 2006, the district court granted judgment to the United States on petitioner's FTCA claims. Pet. App. 4a. FBI agents Buchan and Miller moved to vacate the jury verdict on the *Bivens* claims pursuant to Federal Rule of Civil Procedure 59(e), arguing that the FTCA's judgment bar compelled vacatur of the *Bivens* judgment against them. Pet. App 4a. The district court granted the motion, noting that there "is no question that section 2676 applies in this case." *Id.* at 26a. The court explained that the plain meaning of Section 2676 established that the entry of judgment on petitioner's FTCA claim created a "complete bar to any action" based on the same subject matter, including petitioner's *Bivens* claims. *Ibid.* And because "it is firmly established that section 2676 bars a non-FTCA claim that i[s] determined simultaneously with an FTCA claim," the court reasoned, "it makes no sense to have the effect of section 2676 turn on how promptly the trial judge decides the FTCA claim when FTCA and non-FTCA claims are tried together." *Id.* at 34a. The district court therefore vacated the judgment on the *Bivens* claims. *Id.* at 37a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Citing the consensus among the courts of appeals, the court held that Section 2676 is "plain and unambiguous" that an FTCA judgment serves as a bar to other claims brought within the same action, because the provision applies to "*any* action," and "a claim is necessarily part of an action." *Id.* at 7a; *id.* at 8a-9a. The court found that Congress's "choice of broad language" in the judg-

ment bar—"'a *complete* bar to *any* action'—makes clear that the bar was intended to apply to such claims." *Id.* at 8a.

The court also rejected petitioner's contention that its interpretation of Section 2676 effectively rendered the *Bivens* cause of action a nullity, noting that both causes of action remained open to plaintiffs, and that Section 2676 simply provided that a plaintiff could not pursue both claims to judgment. Pet. App. 10a. A plaintiff who brought both claims in one action and prevailed on the *Bivens* claim could, the court reasoned, voluntarily dismiss the FTCA claim in order to avoid the judgment bar. *Ibid.*

Having established that Section 2676 bars claims brought in the same suit, the court next rejected petitioner's argument that the judgment bar does not apply when the *Bivens* judgment is entered prior to the FTCA judgment in the same action. Pet. App. 14a-16a. The statutory language does not contain any temporal limitation, the court held, and permitting the operation of the judgment bar to turn on whether the *Bivens* or FTCA judgment is entered first would be arbitrary. *Ibid.* The intent of the judgment bar—to "prevent multiple lawsuits as well as multiple recoveries"—is best served, the court concluded, by consistently applying the judgment bar regardless of whether the *Bivens* or FTCA judgment is entered first. *Id.* at 15a (citing *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 859 (10th Cir. 2005)).

ARGUMENT

Petitioner renews (Pet. 7-22) his contention that Section 2676 does not bar "a *Bivens* claim brought in the same suit" as an FTCA claim. Pet. 7. The court of ap-

peals correctly held that the plain language of Section 2676 encompasses *Bivens* claims brought in the same suit. Although petitioner alleges a circuit conflict on the question, the other courts of appeals to consider the issue have overwhelmingly agreed with the Seventh Circuit. Only the Ninth Circuit has deviated from that consensus, and only in a limited respect. That court has held that although Section 2676 bars *Bivens* claims brought in the same action when the plaintiff prevails on her FTCA claims, Section 2676 does not bar claims when the FTCA judgment is adverse to the plaintiff. That limited disagreement does not merit this Court's review. Moreover, subsequent decisions of the Ninth Circuit suggest that that court may reconsider its position; therefore, certiorari is not warranted at this time.

1. The court of appeals correctly concluded that the plain text of Section 2676 provides that an FTCA judgment is a "*complete* bar to *any* action," 28 U.S.C. 2676 (emphasis added), including claims filed concomitantly with the FTCA claim itself. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237, 239-240 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Although petitioner urges (Pet. 19-21) that Section 2676 cannot bar *Bivens* claims brought in the same action as FTCA claims because a "claim" is distinct from an "action," the court of appeals correctly explained that the term "action" incorporates all elements of a civil suit, including the claims within that suit. Pet. App. 8a. As a result, "[b]y acting as a bar to *any* action, § 2676 bars the claims *within* that action." *Ibid.* Under petitioner's reading, Section 2676 "would bar 'any action,' but would not bar pieces of that action, *i.e.*, certain individual claims," a result that would be "inconsistent with the text of the statute." *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir.) ("Because a

claim is a lesser part of an action," "all related claims [within the same action] must come within the ambit of § 2676."), petition for cert. pending, No. 09-294 (filed Sept. 3, 2009).

Congress's "choice of broad language" reflects its intent to go beyond "merely bar[ring] a plaintiff from bringing a subsequent identical action on the same claim." *Serra*, 786 F.2d at 239; see Pet App. 8a. Section 2676 is designed to protect against the drain on government resources that would result from multiple recoveries based on the same conduct, *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 859 (10th Cir. 2005), and that concern is equally operative when the multiple recoveries arise from parallel claims brought within a single lawsuit. Congress also intended to protect the government against the expenditure of resources that arises from having to defend multiple suits, see *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (quoting congressional hearings), cert. denied, 515 U.S. 1144 (1995), and that purpose is likewise implicated when the government is forced to defend simultaneous claims against the government and its employees in one suit.[1] The court of appeals' reading of Section 2676 thus best comports with its purposes and congressional intent.

Accordingly, the courts of appeals have overwhelmingly agreed with the Seventh Circuit that an FTCA judgment bars a *Bivens* judgment on claims brought as part of the same action. See, *e.g.*, *Unus*, 565 F.3d at 122

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[1] Like the prosecution of multiple lawsuits, the pursuit of simultaneous claims against the government and its employees may increase the burden of discovery. In addition, because FTCA claims are tried before a judge but *Bivens* claims may be tried to a jury, the government may have to defend separate trials within the same action.

(finding FTCA judgment to bar *Bivens* judgment in the same suit); *Harris* v. *United States*, 422 F.3d 322, 334 (6th Cir. 2005) ("In accordance with the consistent application of the judgment bar over the fifty years since its enactment, we have held that [Section 2676] applies even when the claims were tried together in the same suit.") (internal quotation marks and citation omitted); *Trentadue*, 397 F.3d at 859 (applying Section 2676 to bar a *Bivens* judgment entered prior to the FTCA judgment in the same suit); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (holding that plaintiff's FTCA judgment against the United States barred his *Bivens* judgment in the same suit); *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Serra*, 786 F.2d at 241 (applying the judgment bar to a *Bivens* claim in the same action, the court noted that "it is inconsequential that the claims were tried together in the same suit"); *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of [Section 2676] order judgment against [the government employee] in favor of [the plaintiff] in the same action.").

Furthermore, all of the courts to consider the issue have agreed that an FTCA judgment requires vacatur of an earlier *Bivens* judgment in the same action. See, *e.g.*, *Trentadue*, 397 F.3d at 859 ("[T]he fact that the district court entered judgment on the *Bivens* claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676."); *Engle* v. *Mecke*, 24 F.3d 133 (10th Cir. 1994); *Ortiz* v. *Pearson*, 88 F. Supp. 2d 151, 167 (S.D.N.Y. 2000). Indeed, nothing in the text of Section 2676 reflects a temporal requirement that only subsequent judgments be barred; rather, it applies to

"*any* action." 28 U.S.C. 2676 (emphasis added). As the court of appeals explained, "'any' means 'any,' regardless of the sequencing of the judgments."[2] Pet. App. 14a.

2. Petitioner contends (Pet. 8-9) that in *Kreines* v. *United States*, 959 F.2d 834 (1992), the Ninth Circuit departed from the consensus of the courts of appeals that an FTCA judgment bars *Bivens* claims brought in the same action. But the Ninth Circuit, like the other courts to consider the issue, has held that Section 2676 does apply when *Bivens* and FTCA claims are brought in the same action; at most, *Kreines* carved out an exception to that rule. And in any event, the reasoning behind *Kreines*'s exception has been undermined by subsequent Ninth Circuit precedent.

The Ninth Circuit first considered the judgment bar's application in a suit involving both *Bivens* and FTCA claims in *Arevalo*, 811 F.2d at 490. There, the court found that Section 2676 barred the *Bivens* claims, holding that "[t]he moment judgment was entered against the government" on the plaintiff's FTCA claim, "then by virtue of section 2676, [the federal employee] was no longer answerable to [plaintiff] for damages." *Ibid.* Thus, the Ninth Circuit recognized, like all other courts of appeals to consider the issue, that Section 2676

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[2] Indeed, a contrary rule would permit some plaintiffs "to escape the judgment bar's preclusive effect" in cases like this one, where the district court waited to enter judgment on the FTCA claim pending further discovery. *Trentadue*, 397 F.3d at 859. Such a rule would render Section 2676 arbitrarily dependent upon the timing of a district court's judgments. Instead, by consistently applying the judgment bar regardless of whether the *Bivens* or FTCA judgment is entered first, the court of appeals ensured a uniform application of Section 2676 consistent with Congress's intent.

bars recovery on *Bivens* claims even when those claims are brought as part of the same action as the FTCA claims. *Ibid.*

Subsequently, in *Kreines*, the Ninth Circuit acknowledged that *Arevalo* had held that pursuant to Section 2676, an FTCA judgment "barred a contemporaneous *Bivens* judgment against a federal employee" in the same suit. *Kreines*, 959 F.2d at 838. The *Kreines* court established an exception to that rule, holding that when the government prevails on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit. *Ibid.* The court reasoned that Section 2676 was "ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous *Bivens* judgment." *Ibid.* Because the court viewed the primary purpose of Section 2676 as preventing dual recoveries arising from subsequent litigation, the court concluded that Section 2676 should not bar a contemporaneous *Bivens* recovery when the government prevailed on the plaintiff's FTCA claim.

Two years after the *Kreines* decision, however, the Ninth Circuit limited *Kreines* to its facts and cast doubt on its reasoning. See *Gasho*, 39 F.3d at 1437. *Gasho* concerned the application of the judgment bar to a plaintiff's *Bivens* claims when the plaintiff had already brought and lost FTCA claims in a separate suit. The court held that "[t]he language [of Section 2676] is not 'ambiguous' or 'vague,'" and that—contrary to *Kreine*'s reasoning—the provision's plain language dictated that the judgment bar should apply regardless of whether the plaintiff had prevailed or lost on the FTCA claims. *Ibid.* ("The statute speaks of 'judgment' and suggests no distinction between judgments favorable and judgments

unfavorable to the government."). The court also cast doubt on *Kreines*'s reading of Section 2676's legislative history, concluding—like the court of appeals in this case—that because Congress was concerned not only with preventing dual recoveries, but also with protecting the government's resources in defending itself and its employees, the concerns animating the judgment bar are implicated even when there is no double recovery. *Ibid.* Thus, although *Gasho* concerned the application of Section 2676 to a subsequent suit, rather than to claims within a single suit (as in *Kreines*), *Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous and that its application within a single suit should depend on whether the FTCA judgment was favorable.

In light of *Gasho*, and given that the Ninth Circuit has not applied *Kreines*'s holding in any subsequent decision, it is entirely possible that the Ninth Circuit will reconsider its position should the opportunity arise. That is particularly so given the consensus that has broadened since *Kreines* was decided, to the effect that Section 2676 applies to claims in "any action," regardless of whether the claims are brought within one action or the plaintiff prevailed on the FTCA claims.[3] Petitioner's

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[3] For the same reasons, any split of authority on whether the outcome of the FTCA decision determines the applicability of the judgment bar (Pet. 11) does not merit review. *Gasho* undermined *Kreines*'s suggestion, 959 F.2d at 838, that the legislative history indicates that Section 2676 should not bar *Bivens* claims in the same action when the plaintiff did not prevail on his FTCA claims. *Gasho*, 39 F.3d at 1437. No other court of appeals has suggested that the outcome of the FTCA judgment is relevant to the application of the judgment bar. Contrary to petitioner's suggestion (Pet. 11), *Trentadue* explicitly holds that the valence of the decision is irrelevant. 397 F.3d at 858 ("[T]he judgment bar in § 2676 precludes plaintiffs from bringing a *Bivens* claim regard-

asserted circuit conflict thus does not merit this Court's review.

3. Petitioner also contends (Pet. 11-17) that the court of appeals' decision conflicts with this Court's statement in *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), that "Congress views FTCA and *Bivens* as parallel [and] complementary." Petitioner maintains (Pet. 13) that under the court's approach, FTCA and *Bivens* "causes of action are neither parallel nor complementary, but rather mutually exclusive," because the plaintiff may pursue only one to final judgment. Petitioner is incorrect.

In *Carlson*, this Court held that the fact that a plaintiff has an available claim under the FTCA does not automatically preempt the *Bivens* cause of action: both *Bivens* and FTCA claims are available to potential plaintiffs at the outset of a case. 446 U.S. at 20 (holding that plaintiffs "shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights"). But the fact that both causes of action are available does not mean that plaintiffs have a right to *recover* on both.[4] The Court did not hold, or even sug-

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ing the same subject matter regardless of whether the final FTCA judgment is rendered in favor of a plaintiff or the government.").

[4] Indeed, the Court has held in other contexts that the *Bivens* cause of action need not be available at all; Congress can opt to provide alternate remedies for constitutional torts even if those remedies offer less extensive relief than a *Bivens* action. See *Bush* v. *Lucas*, 462 U.S. 367, 380-389 (1983); *id.* at 372 (holding that the comprehensive statutory remedial scheme applicable to federal employees preempted *Bivens* actions even if "civil service remedies were not as effective as an individ-

gest, that an FTCA judgment has no effect on a plaintiff's *Bivens* remedy. The plaintiff in *Carlson* did not bring an FTCA claim, and thus the Court had no occasion to consider the effect of the judgment bar in that case. See *Serra*, 786 F.2d at 241 (reasoning that "the instant case, unlike *Carlson*, deals with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy"); see also *Sanchez* v. *Rowe*, 651 F. Supp. 571, 575 n.2 (N.D. Tex. 1986) ("[T]he holding in *Carlson* does not alter the plain meaning of § 2676 because *Carlson* did not deal with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy."); *id.* at 575-576.

Consistently with *Carlson*, the judgment bar permits a plaintiff to bring either an FTCA or a *Bivens* claim, or both. The existence of both causes of action gives plaintiffs a choice between two avenues of recovery—one based on the Constitution, and the other, on state tort law—arising from the same alleged conduct or transaction. See *Unus*, 565 F.3d at 121. But because the availability of both claims creates the potential for duplicative litigation and double recoveries, see *Will* v. *Hallock*, 546 U.S. 345, 354-355 (2006); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996), Congress could reasonably decide to condition its waiver of sovereign immunity on a provision that alleviates these concerns by requiring plaintiffs to choose which claim they will bring to judgment.

Thus, the judgment bar simply affects a plaintiff's strategic calculus at the outset of the action and during

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ual damages remedy and did not fully compensate [the employee] for the harm he suffered") (footnote omitted); *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988) (declining to provide a *Bivens* remedy for Social Security claimants challenging the termination of their benefits).

its course. She can opt to bring either a *Bivens* or FTCA claim alone and pursue that claim to judgment; or she can opt to bring both claims in one action. See *Trentadue*, 397 F.3d at 858. The latter course may provide strategic advantages to a plaintiff, including the ability to utilize discovery to determine the relative strength of the two claims, and the ability to test the government's relative willingness to settle either claim. At the same time, such a plaintiff knows that at some point she must choose between the two claims, and if she decides to pursue relief under *Bivens*, she must conduct the litigation so as to avoid a receiving a judgment on the FTCA claim. Although bringing both claims in one action thus creates the risk that the judgment bar will be triggered, barring recovery on the *Bivens* claims, that risk is simply the trade-off for the advantages that a plaintiff may see in bringing both claims rather than one or the other. See *Unus*, 565 F.3d at 122 (noting that "[l]itigants frequently face tough choices," and that a plaintiff must account for the risk of the judgment bar in strategizing about contemporaneous *Bivens* and FTCA claims).

4. Although petitioner suggests (Pet. 2-4) that the application of the judgment bar to his case was inequitable, petitioner purposefully attempted to obtain judgments on both claims, despite his awareness of the judgment bar. See Pet. App. 9a-10a. Petitioner chose to have both his FTCA and *Bivens* claims adjudicated on the merits, and after obtaining a favorable verdict on his *Bivens* claims, petitioner specifically acknowledged, in a motion filed with the district court, that he was "aware[] of the risk that a judgment on the FTCA claim would nullify the Bivens judgment." *Id.* at 22a-23a. Nevertheless, as the district court found, petitioner con-

tinued to seek a judgment on his FTCA claim. *Id.* at 30a. The vacatur of petitioner's *Bivens* judgment was therefore the foreseeable result of his strategic decision to pursue his FTCA claims despite his knowledge of the risk of doing so.

Petitioner's argument thus reduces to the contention that he should have been allowed to pursue both claims to judgment and then decide which judgment he wanted to "keep." But that regime would be inconsistent with the text and purpose of the judgment bar, because it would give little protection to the employee-defendants or the government. See *Arevalo*, 811 F.2d at 490 ("We recognize that because the [*Bivens*] judgment * * * is greater than the judgment against the government, [plaintiff] might prefer to have the judgment against [the federal employee] rather than the judgment against the government. But it is too late for that choice.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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